

United States District Court Southern District of Texas

Case Number: H-06-1853

ATTACHMENT

Description: Memorandum of Law in support of
Plt's Motion for preliminary injunction

☐ State Court Record ☐ State Court Record Continued

☐ Administrative Record

☐ Document continued - Part 8 of 8 ||

☐ Exhibit to: _____
number(s) / letter(s) _____

Other: _____



EX C

-----Original Message-----

From: Java Gift Card Promotion [mailto:r-2-75684-221@dothej.com]

Sent: Friday, April 08, 2005 11:52 AM

To: Subscriber

Subject: Complimentary \$250 Dunkin Donuts or Starbucks Gift Card Pending Your Participation

[Click here to claim your \\$250 Gift Card](#)



EXHIBIT

Brewer C

Men's Wearhouse v.
Exclusive Gift Cards



[Click here to claim your \\$250 Gift Card](#)

*This promotion is sponsored exclusively by YourSmartRewards and is subject to participation terms and conditions. Receipt of the membership incentive gift requires completion of offer terms, including: age and residency requirements, registration with a valid email address, completion of user survey, sponsor promotions and shipping address verification. Upon completion of all requirements, we will promptly ship your membership incentive gift to your verified shipping address. You may review the status of your account via the member account area at anytime. Participation eligibility is restricted to US residents 18 and over. The trademark owners above have not endorsed this promotion, nor are they affiliated or connected with this promotion in any way. This is a limited time promotion and may expire in the near future. Restrictions may apply. If you no longer wish to receive YourSmartRewards emails, visit the unsubscribe page on the YourSmartRewards site or visit the url: <http://www.YourSmartRewards.com/suppress.htm>. Or, print a copy of this email and send it along with your letter to: YourSmartRewards, 123 N. Congress Ave. #351 Boynton Beach, FL 33426, USA.

To stop receiving emails, [click here](#)



YOUR SMART REWARDS

Congratulations!

Select Your Free Gift Card!

**Starbucks® Gift Card*** ~~\$250~~ Retail - Yours FREE**Dunkin' Donuts® Gift Card*** ~~\$250~~ Retail - Yours FREE**Step 1: Enter your email address below to get started:**Select Your Gift: Enter Your Email:

By submitting, I certify that **I am a U.S. Resident over the age of 18**,
and I agree to the [privacy policy](#) and [participation terms](#)

[Click Here to Claim Your FREE Gift!](#)

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BERTELSMANN**How can we offer this Gift at no cost to you?**

Our advertisers pay to participate in this program which allows us to give you great rewards. To claim your gift simply follow the 3 easy steps. Once you complete the gift eligibility requirements you will receive your gift.

*To claim your gift you must participate in the YourSmartRewards program and meet the eligibility requirements as outlined in the [Program Requirements](#) before you can receive your FREE reward. Eligibility requirements include completion of a marketing survey and sponsor offers.

YourSmartRewards is an independent rewards program and is not affiliated with any of the listed products or retailers. Trademarks, service marks, logos, and/or domain names (including, without limitation, the individual names of products and retailers) are the property of their respective owners, who have no association with or make any endorsement of the products or services provided by YourSmartRewards.

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YOUR SMART REWARDS

Shipping Information

Please tell us where to ship your \$250 Starbucks Gift Card.



Title:	<input type="text" value="Select title"/>
First name:	<input type="text"/>
Last name:	<input type="text"/>
Street Address:	<input type="text"/>
City:	<input type="text"/>
State/Province:	<input type="text" value="Select if US/Canada"/>
Country:	<input type="text" value="United States of America"/>
Zip/Postal Code:	<input type="text"/>
Phone Number:	<input type="text"/>
Date of Birth:	<input type="text" value="Month"/> <input type="text" value="Day"/> <input type="text" value="Year"/>
<input type="button" value="Click Here to Submit When Finished"/>	

*To claim your gift you must participate in the YourSmartRewards program and meet the eligibility requirements as outlined in the [Program Requirements](#) before you can receive your FREE reward. Eligibility requirements include completion of a marketing survey and sponsor offers.

YourSmartRewards is an independent rewards program and is not affiliated with any of the listed products or retailers. Trademarks, service marks, logos, and/or domain names (including, without limitation, the individual names of products and retailers) are the property of their respective owners, who have no association with or make any endorsement of the products or services provided by YourSmartRewards.

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Last Step!

\$250 Starbucks Gift Card - Reserved for:

lmurphy@fulbright.com



Congratulations! To qualify for your FREE* \$250 Starbucks Gift Card start by fully completing any 2 of the sponsor offers listed below on this page! It's fast and easy!

How can we offer this \$250 Starbucks Gift Card at no cost to you? - Our sponsors cover the costs of the \$250 Starbucks Gift Card along with the shipping and handling charges. To claim your \$250 Starbucks Gift Card simply complete the offers as instructed. Once you fulfill the participation requirements, we will ship the incentive gift to you with free shipping.

Prior to us shipping the \$250 Starbucks Gift Card, you will have the opportunity to re-confirm your shipping address to ensure speedy delivery.

TOP OFFERS PAGE 1 of 3

Complete any 2 offers below to get your FREE \$250 Starbucks Gift Card!



Citi® Driver's Edge® Visa Card for College Students

Get Rebates from every credit card purchase! Use your rebates toward a new or used car (any make, any model) - or service, repair or maintenance on your current car! 0% Intro APR! Designed for college & graduate students.

[CLICK HERE!](#)



Citi® Dividend Platinum Select® Visa Card for College Students - Up to 5% Cash Back

- 0% Intro APR for 12 months & No annual fee
- 5% Cash Back on purchases at supermarkets, drugstores & gas stations
- 1% Cash Back on all other purchases
- Designed for college & graduate students

[CLICK HERE!](#)



Citi® Platinum Select® Visa Card for College Students

Get 0% APR on balance transfers & purchases for 12 months. No annual fee. Plus, get Citi® Identity Theft Solutions & \$0 Liability on unauthorized purchases! Designed for college & graduate students!

CLICK HERE!

**VIDEO
Professor**

Computer Training from Video Professor

Get a computer learning lesson on CD-ROM from Video Professor! Choose from over 15 titles and learn new computer skills in 1 hour! Pay only shipping.

CLICK HERE!

5 DVDs
for **49¢**
each
+ shipping & processing

5 DVDs for 49 cents (+ S&P)

Join Columbia House and get 5 DVDs for \$0.49 each (+ Shipping & Processing)! Check out the great selection at Columbia House!

CLICK HERE!



Discover® Platinum Clear Card

- 0% Intro APR
- No Annual Fee
- Up to 2% Cashback Bonus® Award
- Cool, Clear Design
- You must activate your card by making a purchase, balance transfer or cash advance to complete this offer

CLICK HERE!

FREE TRIAL
TEETH WHITENING

Teeth Whitening - \$90 value FREE Trial

Try Appera Teeth Whitening's professional tooth whitening system for FREE at home! (Only pay \$6.95 Shipping & Handling)

CLICK HERE!

**Find HOMES
in Your Area.**

Homes on sale from \$10,000 - Free Search

Bargain Network maintains a nationwide database of properties that are in default, scheduled for auction and bank-owned. Find Homes for sale from \$10,000!

Complete this offer by signing up for the Free Trial with a credit card online and stay on as a member for at least 7 days.

CLICK HERE!

**BLOCKBUSTER
Online**

Blockbuster Online DVD Rental

Rent DVDs from Blockbuster Online: Rent unlimited DVDs plus two free in-store coupons each month. Only \$9.99 for the first month. Free shipping. No return Dates.

CLICK HERE!

**Free Sample of TrimLife**

Lose up to 10 pounds in as little as 7 days with a Free sample of TrimLife! Pay only \$5.95 Shipping.

[CLICK HERE!](#)

**Citi® Dividend Platinum Select® MasterCard - Up to 5% Cash Back**

- 0% Intro APR for 12 months & No annual fee
- 5% Cash Back on purchases at supermarkets, drugstores & gas stations
- 1% Cash Back on all other purchases

[CLICK HERE!](#)

**Citi® Diamond Preferred® Rewards MasterCard**

- 0% Intro APR on balance transfers for 12 months
- \$50 Gift Card - Redeem 5,000 bonus points after 1st purchase
- No annual fee and FREE rewards program

[CLICK HERE!](#)

**Save 85% on Printer Ink & Laser Toners**

Ink Clearance! InkBlvd offers high quality ink for Canon, Epson, HP, Lexmark, and many more!

For this offer, you must make a minimum purchase of \$30 or more to qualify for the gift

[CLICK HERE!](#)

**Body Sculpture - Free Sample**

- Removes Body Fat Cellulite
- Improves skin smoothness and texture
- FREE 14-Day Sample - Pay only \$5.99 Shipping

[CLICK HERE!](#)

**Learn Spanish for FREE from Advantage Spanish**

Get 3 FREE Advantage Spanish Lesson CDs + Bonus CD of Merriam Webster's Spanish - English Dictionary! From Advantage Spanish: Winner of Microsoft Industry Awards - Best Educational Software 2004! Pay only shipping.

[CLICK HERE!](#)

AOL MusicNet - 30 Day FREE Trial

FREE Unlimited Music Downloads for 30 Days! No strings attached. Just try MusicNet®@AOL and get all the hottest new releases! Sign up Now!



**DOWNLOAD MUSIC
THAT'S FAST.
LEGAL. FREE.**

[CLICK HERE!](#)



**GOURMET
COFFEE
FREE!**

FREE 1/2 Pound Guatemalan Antigua Coffee

Get a Half Pound of Guatemalan Antigua Coffee worth a \$32.90 value for FREE from Gourmet Coffee Select! (Only pay \$6.95 Shipping & Handling)

[CLICK HERE!](#)



5 Books for Only \$2

Get 5 best-selling books for only \$2 from The Literary Guild - Plus order today and get a 6th book FREE!

[CLICK HERE!](#)



RealRhapsody - 14 Day FREE Trial

Burn more music and less money! All the songs you want - just 79 cents each with a FREE 14 day trial of RealRhapsody™. No limits or restrictions on the largest legal digital collection in the world!

[CLICK HERE!](#)



Corticet Weight Loss Supplement - Free Sample

Is daily stress making you fat? Try a Free Sample of the Corticet Weight Loss Supplement! (Only pay \$6.95 Shipping & Handling)

[CLICK HERE!](#)



Get 12 CDs for the Price of 1

Get 12 CDs for the price of 1, nothing more to buy, ever! Simply join BMG Music Service and you can choose your FREE CDs from over 12,000 titles. It's 100% RISK FREE!

[CLICK HERE!](#)



Joint Pain Relief - Free Sample

- Builds and sustains strong, healthy joints
- Reliefs pain by increasing joint elasticity
- FREE 15-Day Sample - Pay only \$5.99 Shipping

[CLICK HERE!](#)

Wrinkle Reduction - Free Lifederma Sample

- Reduce Wrinkles & age spots
- Exfoliates dead skin cells



- Regenerates new skin cells
- Moisturizes skin deep below surface
- FREE 14-Day Trial - Pay only shipping

CLICK HERE!



MiracleBurn Weight Loss Package - FREE Trial

- Lose pounds & inches from day 1
- Jump start your metabolism
- Eliminate cellulite and excess fat pockets
- Stimulate your body's natural fat-burning ability
- Pay only \$5.95 Shipping. Cancel Anytime - No Obligation.

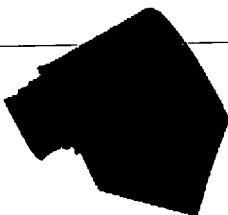
CLICK HERE!



Stamps.com Free 30 Day Trial

With Stamps.com print US Postal Service postage right from your PC. You'll never go to the Post Office again! Sign up now and receive \$5 in FREE postage. Get credit when you stay on for at least 30 days as a Stamps.com member

CLICK HERE!



3 Hand-Made Silk Ties for \$3 Each

Get 3 silk ties from Belisi for only \$3 each. Each one is made with expensive, hand-made silk and quality is guaranteed to be equal to \$75 department store ties!

CLICK HERE!



Health Care Plan for only \$1

Doctor, Hospital, Dentist & Prescription Drug Plan - Just \$1 for 30 days with no further obligation required! From The Journal of American Medicine

CLICK HERE!



Privacy Matters - 30 Day FREE Trial

Try a FREE 30 Day *Privacy Matters* membership & get your FREE Online Credit Report and Credit Score - Pay only a \$1 Processing Fee. Have fun & stay an active member!

CLICK HERE!

Simple Escapes - 30 Day FREE Trial

Try a FREE 30 Day *Simple Escapes* membership & get a FREE \$25 Kmart Gift Card - Pay only a \$1 Processing Fee. Have fun & stay an



active member!
CLICK HERE!

**Simply You - 30 Day FREE Trial**

Try a FREE 30 Day *Simply You* membership & get a FREE \$25 Linens'n Things Gift Card - Pay only a \$1 Processing Fee. Have fun & stay an active member!

CLICK HERE!

**Buyer's Advantage - FREE \$20 Circuit City Gift Card**

Try a 30 Day *Buyer's Advantage* trial membership & get a FREE \$20 Circuit City Gift Card - Pay only a \$1 Processing Fee. No Obligation. Get credit after you have been a member for at least 7 days

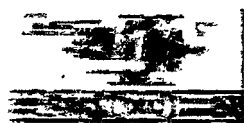
CLICK HERE!

Get

Complete Home - FREE \$20 Lowe's Gift Card

Try a 30 Day *CompleteHome* trial membership & get a FREE \$20 Lowe's Gift Card - Pay only a \$1 Processing Fee. No Obligation. Get credit after you have been a member for at least 7 days

CLICK HERE!

**AutoVantage - FREE \$40 in Gas**

Try a 30 Day *AutoVantage* trial membership & get FREE \$40 in Gas - Pay only a \$1 Processing Fee. No Obligation. Get credit after you have been a member for at least 7 days

CLICK HERE!

After You've Completed 2 Offers above, Go To Next Page

*Receipt of the free incentive gift requires: 1.) Completion of offer terms, including age and residency requirements; shipping address verification; and registration with a valid email address 2.) Completion of user survey. 3.) Participation in sponsor offers. Upon completion of participation requirements, we will ship the incentive gift to you with free shipping.

Yoursmartrewards the incentive offer promotion, is an independent program for consumers and is not affiliated with the merchant/brands listed above. Yoursmartrewards is solely responsible for all incentive fulfillment.

[Check Gift Status](#) - [Privacy Policy](#) - [Terms & Conditions](#) - [Help](#) - [Unsubscribe](#) - [Contact Us](#)

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EXD

FULBRIGHT & JAWORSKI L.L.P.

A REGISTERED LIMITED LIABILITY PARTNERSHIP
865 SOUTH FIGUEROA STREET, 29TH FLOOR
LOS ANGELES, CALIFORNIA 90017
WWW.FULBRIGHT.COM

JOHN C. RAWLS
PARTNER
JRAWLS@FULBRIGHT.COM

DIRECT DIAL: (213) 892-9285
TELEPHONE: (213) 892-9200
FACSIMILE: (213) 680-4518

Certified Article Number

7106 4575 1294 0739 7632

SENDERS RECORD

April 25, 2005

VIA CERTIFIED AND FIRST CLASS MAIL AND E-MAIL

Your Smart Rewards
4846 North University Drive #323
Lauderhill, Florida 33351
cs@popwebmaster.com

Re: **Starbucks Coffee Company**

Dear Sir or Madam:

This firm represents Starbucks Corporation d/b/a Starbucks Coffee Company and its subsidiaries (collectively, "Starbucks"). Starbucks has asked us to contact you because Your Smart Rewards is responsible for certain email and Internet promotions for a "FREE" "\$250 Starbucks® Gift Card," each of which improperly uses the Starbucks® name, the Starbucks Coffee® mark and Starbucks' famous Siren Logo®. We write to request that you discontinue these actions, which violate Starbucks' copyright, trademark and related rights, and confirm that you will not make similar unconsented use of Starbucks' intellectual property in the future.

As you know, Starbucks owns U.S. trademark registrations and worldwide registrations for STARBUCKS®, STARBUCKS COFFEE® and a number of related marks. Starbucks also owns federal trademark and copyright registrations for its famous "Siren Logo," (collectively, the "Starbucks Marks"). Starbucks has used the Starbucks Marks for more than a quarter of a century as the principal identifiers of its business and the products it sells. The Starbucks Marks have acquired substantial goodwill and are extremely important assets of the company. Through the substantial effort and investment of Starbucks' employees and shareholders, consumers have come to associate the Starbucks Marks with premium quality in both products and services.

Starbucks has learned that Your Smart Rewards is sending - or causing other entities to send - unsolicited emails that violate Starbucks' intellectual property rights. These emails offer "\$250 of Starbucks FREE!" and provide a hyperlink to a web page on the <yoursmartrewards.com> Website. The Starbucks® name, the Starbucks Coffee® mark, and the Starbucks Siren Logo® appear in both the emails and on your Website without Starbucks' permission.

Starbucks takes issue with a number of aspects of your promotions:

EXHIBIT

Brewer D

Men's Wearhouse v.
Exclusive Gift Cards

25525406.1

Your Smart Rewards
April 25, 2005
Page 2

(1) Starbucks objects to the entire promotional scheme, which violates Starbucks' policies regarding joint promotions.¹ Your offer is likely to confuse consumers - and even other companies - by causing them incorrectly to believe that Starbucks and Your Smart Rewards have entered into a joint promotion relationship where none exists, and that Your Smart Rewards is somehow authorized by Starbucks to sell or provide its Starbucks Cards.

(2) Your Smart Rewards' offer is false and misleading. Though the subject heading of the emails, the first page of the emails, and the Website promotion all state that the offered card is "FREE," it is actually conditioned on the provision of personal information and the participation in at least six "sponsored offers." This is especially harmful to Starbucks because Your Smart Rewards is also creating a false impression that Starbucks is associated with the offer, and consumers are thus likely to form the mistaken impression that Starbucks is to blame for misleading them.

(3) Your Smart Rewards makes use of the federally registered trademarks Starbucks® and Starbucks Coffee® in a manner that violates Starbucks' well-established rights in the names with respect to its goods and services. Your Smart Rewards also prominently displays an image of the famous Starbucks Siren Logo® on both the unsolicited emails and in the promotion on the <yoursmartrewards.com> Website, which constitutes copyright infringement.

(4) Your Smart Rewards' promotion refers to "Gift Cards." This is an incorrect term, and one that potentially has significant legal consequences for Starbucks. Gift cards are single-use cards that have a particular status and defined meaning for tax purposes. The Starbucks Cards are not gift cards, because they are reloadable multi-use cards, which have a different status under applicable tax laws.

Starbucks would prefer to resolve this issue without the need to resort to litigation. By this letter, we propose a resolution that will avoid the necessity of formal legal proceedings, while ensuring that there is no further injury to Starbucks' copyright and trademark rights. Thus, we ask that you confirm in writing that:

- Your Smart Rewards and any of its subsidiaries and/or affiliates have ceased all use of the Starbucks Marks and any confusingly similar names, marks or logos;
- Your Smart Rewards has destroyed all brochures, signage, labels, flyers, posters, menus, advertisements, emails or other materials which offer Starbucks Cards or include any variation of any of Starbucks' trademarks;

¹ Starbucks has taken pains to ensure that its Starbucks Cards do not become associated with third-party promotions directed to the general public. If you wish to know Starbucks' policies with respect to the distribution of Starbucks Cards, you may call (800) 611-1699, send an email to b2bgroup@starbucks.com, or visit the web page starbucks.com/businessgifts.

Your Smart Rewards

April 25, 2005

Page 3

- Your Smart Rewards has removed depictions of the Starbucks Cards and the Starbucks Marks from all locations, banner ads, promotions, advertisements, emails and Websites that Your Smart Rewards owns, controls or with which it is affiliated;
- Your Smart Rewards will not state, suggest or imply that its business or its products, services or commercial activities are affiliated with, or are sponsored or endorsed by, Starbucks; and
- Your Smart Rewards will not, in the future, use depictions of the Starbucks Cards, the Starbucks Marks or any variations thereof.

For your convenience, we have enclosed an Undertaking that you may simply sign, date and return to us confirming your actions in this matter. Please return the executed Undertaking, by mail or fax, within ten (10) days of the date of this letter. If you have not responded by that time, Starbucks shall take whatever steps that are necessary to preserve and protect its rights.

I look forward to hearing from you and hope that we may resolve this matter amicably. In the interim, however, nothing contained in this letter is intended or should be construed as an admission or waiver of any rights or remedies that Starbucks may have, all of which are hereby expressly reserved.

Very truly yours,


John C. Rawls

Enclosure

UNDERTAKING

John C. Rawls
Fulbright & Jaworski L.L.P.
865 South Figueroa Street, 29th Floor
Los Angeles, CA 90017
Fax: (213) 680-4518

Re: Your Smart Rewards
Distribution of Starbucks Cards and Use of STARBUCKS[®] and
STARBUCKS COFFEE[®] Marks and Starbucks' Siren Logo[®]

Your Smart Rewards and all of its subsidiaries and/or affiliates (collectively, "Your Smart Rewards") hereby agree and acknowledge the following:

1. Your Smart Rewards is the registrant of the domain name <yoursmartrewards.com>;
2. Your Smart Rewards received your letter dated April 25, 2005, regarding its use of the STARBUCKS[®] and STARBUCKS COFFEE[®] trademarks and the Siren Logo[®] (collectively, the "Starbucks Marks");
3. As of _____, 2005, Your Smart Rewards has ceased all use of the Starbucks Marks and any other confusingly similar names, marks or logos;
4. Your Smart Rewards has destroyed all brochures, signage, labels, flyers, posters, menus, advertisements, emails or other materials which offer Starbucks Cards or include any variation of any of Starbucks' trademarks;
5. Your Smart Rewards has removed depictions of the Starbucks Cards and the Starbucks Marks from all locations, banner ads, promotions, advertisements, emails and Websites that Your Smart Rewards owns, controls or with which it is affiliated;
6. Your Smart Rewards will not state, suggest or imply that its business or its products, services or commercial activities are affiliated with, or are sponsored or endorsed by, Starbucks; and

7. Your Smart Rewards will not, in the future, use depictions of the Starbucks Cards, the Starbucks Marks or any variation thereof.

The undersigned certifies that he/she is authorized to sign on behalf of Your Smart Rewards and that all statements set forth above are binding on Your Smart Rewards.

Dated this ____ day of _____, 2005.

YOUR SMART REWARDS

By: _____

Its: _____

Address: 4846 North University Drive #323
Lauderhill, Florida 33351

Email: cs@popwebmaster.com

Ex E

6001 Broken Sound Parkway, STE 200
Boca Raton, FL 33487
May 13, 2005

John C. Rawls, Esq.
Fulbright & Jaworski LLP
865 South Figueroa ST, 29th Floor
Los Angeles, CA 90017

RE: Cease and Desist Letter re Starbucks

Mr. Rawls,

We are in receipt of your letter dated April 25, 2005 regarding our alleged use of the Starbucks name in YourSmartRewards.com promotions.

Background

The promotions we run offer gifts to consumers who provide survey information and sign up for trial offers from our client sponsors. One of the gifts we recently offered, along with comparative gifts from Dunkin Donuts, was \$250 worth of Starbucks' products through distribution of the monetary equivalent or actual gift cards if available from Starbucks and the other retailers.

All offers distributed by YourSmartRewards.com contain the following disclaimer to ensure no consumer confusion regarding the promotions and to comply with the CAN-SPAM Act and other regulations:

*This promotion is sponsored exclusively by YourSmartRewards.com and is subject to participation terms and conditions. Receipt of the membership incentive gift requires completion of offer terms, including: age and residency requirements, registration with a valid email address, completion of user survey, sponsor promotions and shipping address verification. Upon completion of all requirements, we will promptly ship your member incentive gift to your verified shipping address. You may review the status of your account via the member account area at any time. Participation eligibility is restricted to US resident, 18 and over. The trademark owners above have not endorsed this promotion, nor are they affiliated or connected with this promotion in any way. This is a limited time promotion and may expire in the near future. Restrictions may apply. If you no longer wish to receive YourSmartRewards.com emails, visit the unsubscribe page on the YourSmartRewards.com site or visit the url: <http://www.superrewards.com/suppress.htm>. Or, print a copy of this email and send it along with your letter to: YourSmartRewards.com, 123 N. Congress Avenue, #351, Boynton Beach, FL 33426.

Nominative Use

Your YourSmartRewards.com's use of the Starbucks name to describe the gift awarded is in fact "nominative use" under trademark law.

As per several court rulings, including that of most recent circuit court holding for nominative use in Playboy Enterprises v. Welles (2002), the Ninth Circuit held that the test for nominative use is as follows:

"First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder. . . . We noted in New Kids that a nominative use may also be a commercial one."

EXHIBIT

Brewer E

Men's Wearhouse v.
Exclusive Gift Cards

In this case, YourSmartRewards.com is completely unable to describe the gift – money or other negotiable instrument to be used at Starbucks locations -- without mentioning the Starbucks name. Secondly, only minimal use of the name is used in describing the gift and finally, as in *Welles*, there is a clear disclaimer stating that Starbucks does not endorse the promotion and who, in fact, is responsible for it. *Welles* also made clear that dilution does not apply in nominative use cases.

Comparative Use

Additionally, YourSmartRewards.com may use the Starbucks name in comparative advertising under “fair use” to identify an item to be used at Starbucks in accordance with Sec. 1125(c)(4)(a) of the Trademark Act which states that “The following shall not be actionable under this section: (A) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark.”

In this case, our promotion compared Starbucks and Dunkin Donuts coffee.

Conclusion

While we respect Starbucks’s concern and attention to monitoring of its trademarks, we believe that our uses are well within the law. However, as a good faith gesture and without any waiver or admission of any kind, we will cease use of Starbucks name in our distribution of this promotion.

If Starbucks would like to grant us a license in order to obtain possible acknowledgement of Starbucks rights and to police and control alleged uses of Starbucks marks by us in the future, we would welcome such a discussion.

Please feel free to contact me at (561) 939-6918 or jsilver@adinfocenter.com if you have further questions or concerns.

Very truly yours,

A handwritten signature in black ink, appearing to read "F. Silver", written in a cursive style.

Judith A. Silver, Esq.
Asst. General Counsel

EX F

From: *For Coffee Lovers* <coffeelover@superoverdriven.com>
Reply-To: "coffeelover@superoverdriven.com" <coffeelover@superoverdriven.com>
To: <REDACTED>
Subject: *A Free Starbucks Gift Card*
Date: *Mon, 16 Jan 2006 15:09:35 -0500*

From: *Starbucks Treats* <djia@graciousshoppingtreasures.com>
Reply-To: "djia" <djia@graciousshoppingtreasures.com>
To: *REDACTED*
Subject: *Starbucks Drinkers: Read This Now!*
Date: *Wed, 11 Jan 2006 00:24:09 -0800*

>From: Starbucks Treats <kudlow@shoppingexhilaration.com>
>Reply-To: "kudlow" <kudlow@shoppingexhilaration.com>
>To: <REDACTED>
>Subject: Coffee Drinkers: Click Now!
>Date: Wed, 4 Jan 2006 21:24:28 -0800

EXHIBIT

Brewer F

Men's Wearhouse v.
Exclusive Gift Cards

From: *Starbucks Treats* <djia@graciousshoppingtreasures.com>
Reply-To: "djia" <djia@graciousshoppingtreasures.com>
To:
Subject: *Starbucks Drinkers: Read This Now!*
Date: *Wed, 11 Jan 2006 00:24:09 -0800*

Get a bird's eye view of your home with Windows Live Local



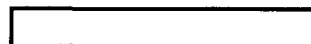
*Starbucks Cards are reloadable cards at Starbucks.com or stores; are not accepted in Puerto Rico, Quebec, Guam and some store locations, and are subject to Starbucks' terms of use. Exclusive Gift Cards' Gift Program is not endorsed, sponsored by or affiliated with STARBUCKS® or Starbucks U.S. Brands, LLC LTD. Such terms are registered trademarks of their respective owners.

*This promotion is conducted exclusively by Exclusive Gift Cards and is subject to participation terms and conditions. Receipt of your item requires compliance with offer terms, including: age and residency requirements, registration with valid email address, shipping address and contact phone number; completion of user survey and sponsor promotions. Upon valid completion of all requirements, we will ship your item to your provided shipping address. Unless otherwise indicated, participation eligibility is restricted to U.S. residents, 18 and over. Void where prohibited. If you no longer wish to receive Exclusive Gift Cards emails, visit the unsubscribe page on the Exclusive Gift Cards site or visit the url: <http://www.exclusivegiftcards.com/suppress.htm>. Or, print a copy of this email and send it along with your request to: Exclusive Gift Cards, 13900 Jog Road Suite 203-251, Delray Beach, FL 33448.

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- Somaliland, the country that wants to be (24-11-2005)



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highlights="true" title="Pope John Paul II . ">Pope John Paul II . Just one comment on the article - no person is beyond hope - even if only it is the hope of those who care - stop calling them "souls". As for the 26,000 asylum-seekers who have exhausted the appeals procedures, give them some land after the model of the Palestinian plight - give them Texas!

- [Venice in a new light](#)

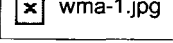
title="RN Afrique">RN Afrique
highlights="true" title="Ageing dossier">Ageing dossier
• [Nederlands](#)

Africa is regarded by much of the world as "the ultimate stranger", but the continent has a rich history and culture

- Vox Humana

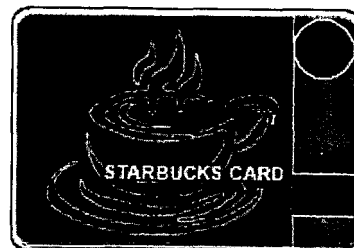
"I think we are putting a time bomb under our society. We are luring people into an illegal existence where they are excluded from social benefits and have to steal to survive."

also part of:
Culture and
history

-  [wma-1.jpg](#)
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*Starbucks Cards are reloadable cards at Starbucks.com or stores; are not accepted in Puerto Rico, Quebec, Guam and some store locations; and are subject to Starbucks' terms of use.

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*This promotion is conducted exclusively by ExclusiveGiftCards and is subject to participation terms and conditions. Receipt of your item requires compliance with offer terms, including: age and residency requirements; registration with valid email address, shipping address and contact phone number; completion of user survey and sponsor promotions. Upon valid completion of all Program Requirements. We will ship your item to your provided shipping address. Unless otherwise indicated, participation eligibility is restricted to US residents, 18 and over. Void where prohibited.

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Shipping Information

Please tell us where to ship your StarBucks® \$250 Gift Card.



FREE* \$250 in
Starbucks® Cards

Title:

First name:

Last name:

Street Address:

City:

State/Province:

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Zip/Postal Code:

Phone Number:

Date of Birth:

[Click Here to Submit When Finished](#)

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Last Step!

StarBucks® \$250 Gift Card - Reserved for:

marionagarcia@hotmail.com



FREE* \$250 in
Starbucks® Cards

Congratulations! To qualify for your FREE* StarBucks® \$250 Gift Card start by fully completing any 2 of the sponsor offers listed below on this page! It's fast and easy!

How can we offer this StarBucks® \$250 Gift Card at no cost to you? - Our sponsors cover the costs of the StarBucks® \$250 Gift Card along with the shipping and handling charges. To claim your StarBucks® \$250 Gift Card simply complete the offers as instructed. Once you fulfill the participation requirements, we will ship the incentive gift to you with free shipping.

Prior to us shipping the StarBucks® \$250 Gift Card, you will have the opportunity to re-confirm your shipping address to ensure speedy delivery.

TOP OFFERS PAGE 1 of 3

Complete any 2 offers below to get your FREE StarBucks® \$250 Gift Card!



Citi® Dividend Platinum Select® Visa Card for College Students - Up to 5% Cash Back

- 0% Intro APR for 12 months & No annual fee
- 5% Cash Back on purchases at supermarkets, drugstores & gas stations
- 1% Cash Back on all other purchases
- Designed for college & graduate students

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Citi® Platinum Select® Visa Card for College Students

Get 0% APR on balance transfers & purchases for 12 months. No annual fee. Plus, get Citi® Identity Theft Solutions & \$0 Liability on unauthorized purchases! Designed for college & graduate students!

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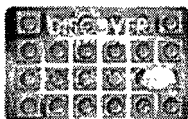


Citi® Driver's Edge® Visa Card for College Students

Get Rebates from every credit card purchase! Use your rebates toward a new or used car (any make, any model) - or service, repair or maintenance on your current car! 0% Intro APR! Designed for college & graduate students.

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Discover® Platinum Clear Card



- 0% Intro APR
- No Annual Fee
- Up to 2% Cashback Bonus® Award
- Cool, Clear Design
- You must activate your card by making a purchase, balance transfer or cash advance to complete this offer

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Computer Training from Video Professor

Get a computer learning lesson on CD-ROM from Video Professor! Choose from over 15 titles and learn new computer skills in 1 hour! Pay only shipping.

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Learn Spanish, French, Italian or German for FREE

Get 3 FREE Advantage Language Lesson CDs + Bonus CD of the WordPoint Instant Translator! From Advantage Language: Winner of Microsoft Industry Awards - Best Educational Software 2004! Pay only shipping.

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2 Bottles of Premium Wine at a Great Price!

For only \$25.95* you'll receive two expertly selected Premium Wines (that's just \$12.97* per bottle!) delivered right to your door from International Wine Cellars.

Discover fine wines from all the great winemaking regions around the world. Our team of experts find the hidden gems from boutique wineries that you just won't find at your local store. Order today to begin a wonderful journey into the world of fine wine, at a terrific price!

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Rent DVDs Online with NO Late Fees

Try Netflix for FREE - Rent as many DVDs as you want with plans starting at only \$9.99 a month. No Late Fees. Keep each DVD as long as you want. You must complete the free Netflix trial & become a paying member to receive credit. First-time Netflix customers only.

[CLICK HERE!](#)



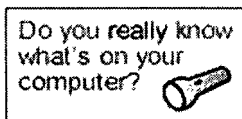
Lose Weight While You Sleep

Lose weight while you sleep with LeanLifePM! With all natural, stimulant-free ingredients, LeanLifePM kick-starts your metabolism and cleanse your body of toxins, while you sleep! Try a 7 day supply FREE! Pay only \$6.95 Shipping.

[CLICK HERE!](#)

AOL - FREE 30 Day Trial + 10 FREE Songs from iTunes

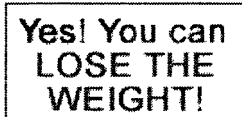
Try the All-New AOL® FREE for 30 Days + get 10 FREE Songs from



iTunes! You can use your AOL Screen Name on iTunes, making set-up a snap!

Complete this offer by signing up for the Free Trial online (You will NOT be charged for the Free Trial). To avoid being charged a fee, simply cancel your membership before the FREE Trial period ends.

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CortiBan Weight Loss with HOODIA

Aren't you ready for Low-Stress, Natural, Permanent Weight Loss? CortiBan Ultra with HOODIA is the perfect combination of powerful herbs that will help you lose that weight! Try a 30 day supply FREE! Pay only \$4.95 Shipping.

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Save 85% on Printer Ink & Laser Toners

Ink Clearance! InkBlvd offers high quality ink for Canon, Epson, HP, Lexmark, and many more!

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5 DVDs for 49 cents (+ S&P)

Join Columbia House and get 5 DVDs for \$0.49 each (+ Shipping & Processing)! Check out the great selection at Columbia House!

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Homes on sale from \$10,000 - Free Search

Bargain Network maintains a nationwide database of properties that are in default, scheduled for auction and bank-owned. Find Homes for sale from \$10,000!

Complete this offer by signing up for the Free Trial with a credit card online and stay on as a member for at least 7 days.

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Citibank FREE Credit Report

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Disney Movie Club - Get 3 Movies for \$1.99 Each

Join Disney Movie Club & get 3 Disney movies for only \$1.99 each + FREE SHIPPING! Pick your 3 movies from new and classic Disney favorites such as Bambi, The Incredibles, Finding Nemo, and much more!

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AOL MusicNet - 30 Day FREE Trial

Love music? Get fast, legal, FREE downloads for 30 days on your high-speed connection! Try AOL and MusicNow®@AOL Today.

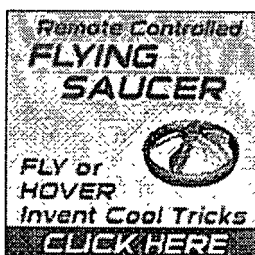
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Get 12 CDs for the Price of 1

Get 12 CDs for the price of 1, nothing more to buy, ever! Simply join BMG Music Service and you can choose your FREE CDs from over 12,000 titles. It's 100% RISK FREE!

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Amazing Remote Control Flying Saucer

The hottest toy this season flies or hovers up to 30 feet, indoors or outdoors. Save 33% off retail price. Only \$19.95 (+ S&H)!

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Stamps.com Free 30 Day Trial

With Stamps.com print US Postal Service postage right from your PC. You'll never go to the Post Office again! Sign up now and receive \$5 in FREE postage. Get credit when you stay on for at least 30 days as a Stamps.com member

CLICK HERE!



Discover® Gas Card

- 0% Intro APR
- No Annual Fee
- Up to 5% Cashback on Gas Purchases
- Up to 1% Cashback on all other Purchases

If you've already applied for another Discover Card, do NOT apply for this card. Discover will only approve 1 card application at a time for the same person.

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Citi® Dividend Platinum Select® MasterCard - Up to 5% Cash Back

- 0% Intro APR for 12 months & No annual fee
- 5% Cash Back on purchases at supermarkets, drugstores & gas stations
- 1% Cash Back on all other purchases

CLICK HERE!



Citi® Diamond Preferred® Rewards MasterCard

- 0% Intro APR on balance transfers for 12 months
- \$50 Gift Card - Redeem 5,000 bonus points after 1st purchase
- No annual fee and FREE rewards program

[CLICK HERE!](#)



8 Disney Storybooks for only \$3.99

Kids love storybooks based on their favorite Disney movies! Get 7 timeless Disney storybooks FREE when you purchase just one book for only \$3.99 (+S&H). These storybooks are not available in stores and by ordering today, you'll also get a FREE Backpack featuring Winnie the Pooh! A Special Offer from Disney Wonderful World of Reading.

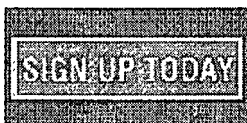
[CLICK HERE!](#)



8 Dr. Seuss Storybooks for only \$3.99

Welcome to The Beginning Readers' Program, a fun-filled club featuring best-selling storybooks by Dr. Seuss & His Friends. It's where you'll find The Cat In the Hat, Sam-I-am, Arthur, the Berenstain Bears, Thomas the Tank Engine and many more of your child's favorite storybook characters all in one place. Get 7 hardcover storybooks for FREE when you purchase just one book for only \$3.99 (+S&H).

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EarthLink Dial Up Internet Access

Try EarthLink internet access at LESS THAN HALF the cost of other ISPs such as AOL - As Low as \$9.95/Month. Surf up to 5X Faster. Exclusive blocking tools control popups, spyware, and more!

[CLICK HERE!](#)



Free Sample of TrimLife

Lose up to 10 pounds in as little as 7 days with a Free sample of TrimLife! Pay only \$5.95 Shipping.

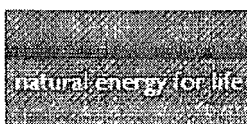
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CurbYourCravings Weight Loss Patch

Lose weight week after week, month after month with The Curb Your Cravings Plus Topical Weight Loss Patch! Try a 1 week supply FREE! Pay only \$6.95 Shipping.

[CLICK HERE!](#)



Keep Your Energy Levels at Their BEST

Feeling tired and exhausted? Actipril is an invigorating blend of all-natural herbs to help give you the boost you need to help kick your body's energy levels into overdrive! Try a FREE 7-day sample and feel the difference! Pay only \$5.95 Shipping.

[CLICK HERE!](#)

**Control & Reduce Stress with Relaset**

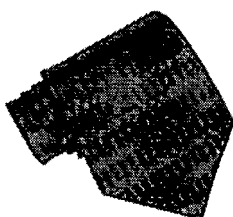
Feeling stressed out? Whatever your reason for stress might be, Relaset contains vitamins and minerals that help support the nervous system, and help battle the daily effects of stress on the body. Try a FREE sample and feel the difference! Pay only \$5.95 Shipping.

[CLICK HERE!](#)

**Lower Bad Cholesterol with Ventracol**

High cholesterol can result in a heart attack or stroke. Ventracol has been scientifically formulated to help provide vitamins and minerals essential to maintaining healthy cholesterol levels. Try a FREE 7 day sample! Pay only \$5.95 Shipping.

[CLICK HERE!](#)

**3 Hand-Made Silk Ties for \$3 Each**

Get 3 silk ties from Belisi for only \$3 each. Each one is made with expensive, hand-made silk and quality is guaranteed to be equal to \$75 department store ties!

[CLICK HERE!](#)

**Citi® Driver's Edge® Platinum Select® Card**

Earn up to 6% in automotive rebates on your everyday purchases. Use your rebates toward a new or used car (any model) or service, repair or maintenance on your current car.

[CLICK HERE!](#)

**RealRhapsody - 14 Day FREE Trial**

Download more music! All the songs you want. Just 89 cents each with a FREE 14 day trial of RealRhapsody™ - No limits or restrictions on the largest legal digital collection in the world!

[CLICK HERE!](#)

**Health Care Plan for only \$1**

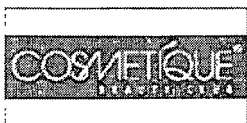
Doctor, Hospital, Dentist & Prescription Drug Plan - Just \$1 for 30 days with no further obligation required! From The Journal of American Medicine

[CLICK HERE!](#)

**Time Life Love Songs**

Get a FREE introductory CD - When A Man Loves A Woman - from the Ultimate Love Songs Collection from Time Life! When A Man Loves A Woman includes some of the most romantic songs of the past four decades--performed by some of the biggest artists ever! An \$18.99 Value, yours FREE!

CLICK HERE!



\$117 Value Cosmetics Collection for \$1

Join Cosmetique today and get the exclusive 7-piece DIANDRA Cosmetics Collection (a \$117 Value) for only \$1 (+ \$4.95 S&H). Order today and get 2 gifts: A Free designer shoulder bag and a surprise gift!

CLICK HERE!

After You've Completed 2 Offers above, Go To Next Page

*Receipt of the free incentive gift requires: 1.) Completion of offer terms, including age and residency requirements; shipping address verification; and registration with a valid email address 2.) Completion of user survey. 3.) Participation in sponsor offers. Upon completion of participation requirements, we will ship the incentive gift to you with free shipping.

Exclusivegiftcards the incentive offer promotion, is an independent program for consumers and is not affiliated with the merchant/brands listed above. Exclusivegiftcards is solely responsible for all incentive fulfillment.

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EX ←

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FORTY-FIRST FLOOR
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WWW.FULBRIGHT.COM

JRAWLS@FULBRIGHT.COM
PARTNER
DIRECT DIAL: (213) 892-9285

TELEPHONE: (213) 892-9200
FACSIMILE: (213) 892-9494

Certified Article Number

7160 3901 9849 1727 4185

SENDERS RECORD

January 18, 2006

VIA U.S. AND CERTIFIED MAIL

Exclusive Gift Cards
13900 Jog Road, Suite 203-251
Delray Beach, Florida 33446

Re: **Starbucks Coffee Company**

Dear Sir or Madam:

This firm represents Starbucks Corporation d/b/a Starbucks Coffee Company and its subsidiaries (collectively, "Starbucks"). It has come to Starbucks' attention that Exclusive Gift Cards distributes "spam" email advertisements advertising an Internet promotion offering "FREE \$250 in Starbucks Cards." Your emails and Internet promotion improperly use Starbucks' trademarks in a manner creating a false impression that Starbucks approves or is in some way connected to your business activities. The purpose of this letter is to demand that you discontinue these actions, which violate Starbucks' trademark and related rights, and confirm that you will not make similar unconsented use of Starbucks' intellectual property in the future.

Starbucks is the registered owner of trademarks in the names STARBUCKS®, STARBUCKS COFFEE® and a number of related terms (collectively, the "Starbucks Marks"). Starbucks has used its trademarks for more than thirty years as the principal identifiers of its business and the products it sells. Through the substantial effort and investment of Starbucks' employees and shareholders, consumers have come to associate the Starbucks Marks with premium quality in both products and services.

Starbucks has learned that Exclusive Gift Cards is sending to consumers unsolicited "spam" emails with links to a promotion involving "free" Starbucks Cards on Exclusive Gift Cards' Web site at the URL <<http://www.exclusivegiftcards.com>>. The subject lines of some of the email solicitations contain the word "Starbucks," even though Starbucks has nothing to do with the ads (e.g., "Starbucks Drinkers: Read This Now!" and "A Free Starbucks Gift Card"). Moreover, Exclusive Gift Cards' offer is false and extremely misleading. Though the emails and Website promotion state that the offered card is "FREE," it is actually conditioned on the provision of personal information, the completion of a lengthy "survey" consisting of repeated

EXHIBIT

Brewer G

25615619.1

HOUSTON • NEW YORK • WASHINGTON DC • AUSTIN • DALLAS • LOS ANGELES • MINNEAPOLIS • SAN ANTONIO
DUBAI • HONG KONG • LONDON • MUNICH • RIYADH

Men's Wearhouse v.
Exclusive Gift Cards

Exclusive Gift Cards
January 18, 2006
Page 2

solicitations for the sale of goods and services unrelated to Starbucks, and the participation in at least 6 "offers" that, in fact, are not "free."

The foregoing demeans and dilutes the goodwill that Starbucks has developed in its trademark by creating the false impression that Starbucks is the sender of junk email and/or that Starbucks has some affiliation with Exclusive Gift Cards and its misleading Internet promotion.¹ Your actions are particularly harmful to Starbucks because consumers are likely to form the mistaken impression that Starbucks is to blame for misleading them.

In light of the seriousness of this matter, Starbucks has instructed us to inform you that Exclusive Gift Cards must:

- Confirm that it has terminated the distribution of these spam emails;
- Provide us with data from which Starbucks can determine how many such emails were distributed, the email addresses to which they were sent, the identity of all consumers who lodged complaints or expressed confusion as a result of the ads, and the amount of revenue and profit generated by this promotion;
- Identify any other entities sending the spam emails involved in this promotion so that Starbucks can contact them directly; and
- Terminate its Internet promotion and confirm that Exclusive Gift Cards will make no further misuse of Starbucks' name or marks.

Starbucks always prefers to resolve this type of issue without resort to litigation. We therefore request that you provide written compliance with all of the demands set forth above within ten (10) days of the date of this letter.

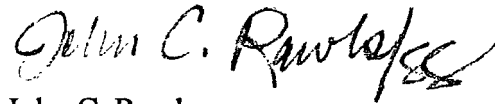
Should you have any questions regarding Starbucks' position in this matter, please contact me directly. Pending further agreement between Starbucks and Exclusive Gift Cards,

¹ Starbucks has taken pains to ensure that its Starbucks Cards do not become associated with third-party promotions directed to the general public. If you wish to know Starbucks' policies with respect to the distribution of Starbucks Cards, you may call (800) 611-1699, send an email to b2bgroup@starbucks.com, or visit the web page starbucks.com/businessgifts.

Exclusive Gift Cards
January 18, 2006
Page 3

nothing contained in this letter is intended or should be construed as an admission or a waiver of any rights or remedies Starbucks may have, all of which are hereby expressly reserved.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Rawls" followed by a stylized flourish or set of initials.

John C. Rawls

EX H

-----Original Message-----

From: Judith Silver [mailto:jsilver@adinfocenter.com]

Sent: Thursday, February 16, 2006 2:49 PM

To: Rawls, John C.

Subject: emails

Importance: High

Mr. Rawls,

I am in receipt of your February 14, 2006 letter.

As per my prior email , I am again requesting full and complete emails as you allege that we have sent. Your letter merely attaches 2 blank pages.

I need the full, non-redacted, online version so that I can click and review the links, examine the header and footer, etc. to discover who the sender is and respond to your allegations. I cannot respond to any of your email allegations without this information.

As far as I am aware the YourSmartRewards promotion was discontinued as I stated.

Both YourSmartRewards and ExclusiveGiftCards are fictitious names we use for different website promotional channels.

None of this is fraudulent as we do in fact give away your cards without charge to our users. I will get a count of the cards given away thus far and get back to you with that information after I review the emails and prepare a formal reply.

Please confirm receipt.

Thank you.

Judith A. Silver, Esq.

Asst. General Counsel

Phone: 561.939.6918

Fax: 561.997.5431

jsilver@adinfocenter.com

02/17/2006

EXHIBIT

Brewer H

Men's Wearhouse v.
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